92-425

Supreme Court, U.S.
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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER 1992 TERM

GOLDSTAR (PANAMA), S.A., (AND CONTINUED HEREIN),

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the violation of article 43 of the Annexed Regulations to the Hague Convention IV of 1907, by the United States military forces in Panama in December 1989, gives rise to a private cause of action where the Republic of Panama has requested the United States courts to resolve the claims of its citizens.

2. Whether the violation of article 43 of the Annexed Regulations to the Hague Convention IV of 1907, by United States military forces in Panama in December, 1989, gives rise to a cause of action under the Federal Tort Claims Act.

3. Whether the signatories to the Hague Convention IV of 1907 have discretion in performing duties imposed by the treaty.

4. To what extent have the signatories to the Hague Convention IV of 1907 relinquished sovereign immunity.

PARTIES TO THE PROCEEDINGS BELOW AND CORPORATE DISCLOSURE STATEMENT

All appellants in the Court below are petitioners herein.

The parties to the proceeding in Case No. 91-2229 in the Court of Appeals for the Fourth Circuit were:

Goldstar (Panama), S.A., Appellant
Modas Kosmas, S.A., Appellant
Estacion Paitilla, S.A., Appellant
Confecciones Boston, S.A., Appellant
Mirtex Industries (Thailand) LTD, Appellant
Luis Varcacia, S.A., Appellant
Amaily Corporation, Inc., Appellant
El Mundo de las Telas, S.A., Appellant
Muebleria Nuevo Arte Catolico, S.A., Appellant
Importadora y Exportadora Mirna, S.A., Appellant
Compania Panamena de Maquinarias, S.A., (COPAMA), Appellant
Pollos Central, S.A., Appellant
El Agricultor de Panama, S.A., Appellant
Pollos Calidonia, S.A., Appellant
Empolladora Panama, S.A., Appellant
Empacadora Avicola, S.A., Appellant
Rimex International, S.A., Appellant
Avon de Panama, S.A., Appellant
Embutidos y Conservas de Pollo, S.A., Appellant
Comercial Madedera, S.A., Appellant
Pollos de Colon, S.A., Appellant
Melo y Compania de Colon, S.A., Appellant
Multisistemas, S.A., Appellant
Compania de Finanzas y Servicios, S.A., Appellant
Industria Nacional de Madera, S.A., Appellant
Fincas Industriales Melo, S.A., Appellant
Ferreteria y Jardineria, S.A., Appellant
Melo y Compania de Rio Abajo, S.A., Appellant
Melo y Compania, S.A., Appellant
Mister Pollo, S.A., Appellant
Pio-Pio, S.A., Appellant
Altos de Vistamares, S.A. (Altos de Cerro Azul), Appellant

PARTIES TO THE PROCEEDINGS BELOW AND CORPORATE DISCLOSURE STATEMENT *(Continued)*

Motores Vista Hermosa, S.A., Appellant
Fonda Antioquena, Appellant
Comercializadora Internacional, S.A., Appellant
Delzai, S.A., Appellant
Compania Atlas, S.A., Appellant
Datacom, S.A., Appellant
Calzados Infantiles, S.A., Appellant
Supermercado Sogo, S.A., Appellant
Farmacia el Dorado y Farmacia Boulevard el Dorado, Appellant
La Casa del Zinc, Appellant
Lindo & Maduro, S.A., Amicus Curiae
Cia. Panamena de Aceites, S.A., Amicus Curiae
Epsilon, S.A., Amicus Curiae
Distribuidora El Chorro, S.A., Amicus Curiae
Distribuidora Gatun, S.A., Amicus Curiae
Administradora de Industrias y Comercio, S.A., Amicus Curiae
Distribuidora Las Mendozas, S.A., Amicus Curiae
Distribuidora Premier, S.A., Amicus Curiae
Torneria Especializada, S.A., Amicus Curiae
Terminales Panama, S.A., Amicus Curiae
Ricardo Perez, S.A., Amicus Curiae
Dynamos Corporation, S.A., Amicus Curiae
Corporation Financiera de Equipo, S.A., Amicus Curiae
Toyota Rent A Car, S.A., Amicus Curiae
Panama Bond Corporation, S.A., Amicus Curiae
Hot Shop, S.A., Amicus Curiae
Diacor, S.A., Amicus Curiae
Cemali, S.A., Amicus Curiae
Espanola, S.A., Amicus Curiae
Amelia, S.A., Amicus Curiae
Medic, S.A., Amicus Curiae
Cesar Arrocha Graell & Co., S.A., Amicus Curiae
Productos Superiores, S.A., Amicus Curiae
Abernathy, S.A., Amicus Curiae
Clamps, S.A., Amicus Curiae

PARTIES TO THE PROCEEDINGS BELOW AND CORPORATE DISCLOSURE STATEMENT *(Continued)*

Supro Mundial, S.A., Amicus Curiae
Vulcapan, S.A., Amicus Curiae
Cencal, S.A., Amicus Curiae
Super Colmar, S.A., Amicus Curiae
Super Mercado Monte Oscuro, S.A., Amicus Curiae
Super Deposito, S.A., Amicus Curiae
Meso, S.A., Amicus Curiae
Super Dorado, S.A., Amicus Curiae
Importadora Ricamar, S.A., Amicus Curiae
Panaderia y Dulceria La Sabrocita 99, S.A., Amicus Curiae
Orosi, S.A., Amicus Curiae
Granos del Nilo, S.A., Amicus Curiae
Super Centro Juan Diaz, S.A., Amicus Curiae
Farmacia Mejor Salud, S.A., Amicus Curiae
Farmacia Mejor Salud #1, S.A., Amicus Curiae
Farmacia Mejor Salud #3, S.A., Amicus Curiae
H. Tzanetatos, Inc., Amicus Curiae
Proveedora Universal, S.A., Amicus Curiae
Inmobiliaria La Rivera, S.A., Amicus Curiae
Lavery Panama, S.A., Amicus Curiae
Blue Ribbon Products, S.A., Amicus Curiae
Inmobiliaria Argo, S.A., Amicus Curiae
Rodelag, S.A., Amicus Curiae
Rodelag Lacal, S.A., Amicus Curiae
Rodelag Otros, S.A., Amicus Curiae
Oficina Universal, S.A., Amicus Curiae
Llantas, S.A., Amicus Curiae
Rodelag David, S.A., Amicus Curiae
Gerencia y Administracion de Computo, S.A., Amicus Curiae
Gerencia y Administracion, S.A., Amicus Curiae
Centro de Distribucion, S.A., Amicus Curiae
Servicios Agroquimicos, S.A., Amicus Curiae
Central Agricola, S.A., Amicus Curiae
United States of America, Appellee

The parties to the proceeding in Case No. 92-1042 in the Court of Appeals for the Fourth Circuit were:

PARTIES TO THE PROCEEDINGS BELOW AND CORPORATE DISCLOSURE STATEMENT *(Continued)*

Mauricio Deportes, S.A., Appellant
El Dorado Importadora y Exportadora, S.A., Appellant
Farmacia Olimpica, S.A., Appellant
Ferber, S.A. (Novedades Finitas), Appellant
Reproducciones y Originales, S.A., y/o Reprosa El Panama, S.A., Appellant
Tejidos Raquel, S.A., (Textilindo), Appellant
Comercial del Pacifico, S.A., Appellant
United States of America, Appellee

Pursuant to Supreme Court Rule 29.1, petitioners, appellants below, state that they have no parent companies which are not parties hereto, or subsidiaries which are not wholly-owned. Petitioner Datacom, S.A. (No. 91-2229) has issued shares to the public.

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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER 1992 TERM

GOLDSTAR (PANAMA), S.A.; MODAS KOSMAS, S.A.; ESTACION PAITILLA, S.A.; CONFECCIONES BOSTON, S.A.; MIRTEX INDUSTRIES (THAILAND) LTD; LUIS VARCACIA, S.A.; AMAILY CORPORATION, INC.; EL MUNDO DE LAS TELAS, S.A.; MUEBLERIA NUEVO ARTE CATOLICO, S.A.; IMPORTADORA Y EXPORTADORA MIRNA, S.A.; COMPANIA PANAMENA DE MAQUINARIAS, S.A. (COPAMA); POLLOS CENTRAL, S.A.; EL AGRICULTOR DE PANAMA, S.A.; POLLOS CALIDONIA, S.A.; EMPOLLADORA PANAMA, S.A.; EMPACADORA AVICOLA, S.A.; RIMEX INTERNATIONAL, S.A.; AVON DE PANAMA, S.A.; EMBUTIDOS Y CONSERVAS DE POLLO, S.A.; COMMERCIAL MADEDERA, S.A.; POLLOS DE COLON, S.A.; MELO Y COMPANIA DE COLON, S.A; MULTISISTEMAS, S.A.; COMPANIA DE FINANZAS Y SERVICIOS, S.A.; INDUSTRIA NACIONAL DE MADERA, S.A.; FINCAS INDUSTRIALES MELO, S.A; FERRETERIA Y JARDINERIA, S.A; MELO Y COMPANIA DE RIO ABAJO, S.A.; MELO Y COMPANIA, S.A.; MISTER POLLO, S.A.; PIO-PIO, S.A.; ALTOS DE VISTAMARES, S.A. (ALTOS DE CERRO AZUL); MOTORES VISTA HERMOSA, S.A.; FONDA ANTIOQUENA; COMMERCIALIZADORA INTERNACIONAL, S.A.; DELZAI, S.A.; COMPANIA ATLAS, S.A.; DATACOM, S.A.; CALZADOS

INFANTILES, S.A.; SUPERMERCADO SOGO, S.A.; FARMACIA EL DORADO Y FARMACIA BOULEVARD EL DORADO; AND LA CASA DEL ZINC; AND MAURICIO DEPORTES, S.A.; EL DORADO IMPORTADORA Y EXPORTADORA, S.A.; FARMACIA OLIMPICA, S.A.; FERBER, S.A. (NOVEDADES FINITAS); REPRODUCCIONES Y ORIGINALES, S.A., Y/O REPROSA EL PANAMA, S.A.; TEJIDOS RAQUEL, S.A. (TEXTILINDO); COMERCIAL DEL PACIFICO, S.A.,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Petitioners pray that a writ of *certiorari* issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in Case No. 91-2229 on June 16, 1992, and the order entered in Case No. 92-1042 on July 31, 1992.

OPINIONS BELOW

The underlying opinion of the Court of Appeals in Case No. 91-2229 is as yet reported, and is appended hereto. (App. A1). The order of the district court in Case No. 91-2229 is appended hereto. (App. A13). The orders of the Court of Appeals in Case No. 92-1042 and of the district court in that case are also appended. (App. A10, A14, respectively). The order of the Court of Appeals in Case No. 92-1042 summarily affirmed dismissal of that action in light of the court's decision in *Goldstar (Panama), S.A., et al. v. U.S.* (No. 91-2229).

JURISDICTIONAL STATEMENT

The judgment of the Court of Appeals in Case No. 91-2229 was entered on June 16, 1992. The dismissal order in Case No. 92-1042 was entered on July 31, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

TREATIES AND STATUTES INVOLVED

Hague Convention IV of 1907, article 3, and articles 42 and 43 of the Annexed Regulations, 36 Stat. 2277, 2290, 2306; 28 U.S.C. §§ 1346(b), 1350, 2671-2680. (*See* Apps. A16-A17).

STATEMENT OF THE CASE

Petitioners initiated Court of Appeals Case No. 91-2229 by filing a complaint in the district court for damages arising out of the invasion of Panama by United States military forces on December 20, 1989. Jurisdiction in the district court was established under 28 U.S.C. § 1346(b). The government filed a motion to dismiss which was granted by the district court on September 6, 1991. (App. A13). Petitioners appealed to the Court of Appeals. The Republic of Panama had transmitted two Diplomatic Notes to the United States requesting that the United States courts assert jurisdiction over the claims. (Apps. A18-A27). Petitioners filed a motion on March 4, 1992 to have the Court of Appeals include one Note, dated January 21, 1992, in the record.[1] The Court of Appeals denied that motion on June 16, 1992. (App. A11).

The complaint in Case No. 92-1042, also establishing jurisdiction under 28 U.S.C. § 1346(b), arose out of the same set of facts complained of in No. 91-2229, and presented virtually the same issues. The only difference between the two cases pertains to proof of damages for the various parties. On December 13, 1991, the district court dismissed Case No. 92-1042 in light of its dismissal order in Court of Appeals No. 91-2229, and a ruling by the federal

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[1]A motion for leave to file that Diplomatic Note in the record was submitted by *amici curiae* on February 21, 1992, and was denied on March 2, 1992. (App. A12). Another Diplomatic Note, dated August 19, 1991, was placed before the district court. (*See* Apps. A18-A21).

district court for the District of Columbia in *Industria Panificadora, S.A., et al. v. U.S.*, 763 F. Supp. 1154 (D.D.C. 1991), *aff'd*, 957 F.2d 886 (D.C. Cir. 1992), *petition for cert. filed* July 10, 1992 (No. 92-76).[2] On July 31, 1992, the Court of Appeals granted the government's motion for summary affirmance of the district court's dismissal order in No. 92-1042.

The pertinent facts, as set forth in the record in No. 91-2229, are as follows. The Armed Forces of the United States entered Panamanian territory on December 20, 1989. (Amended Complaint, para. 3). Those armed forces occupied, pacified and controlled at least until January 10, 1990, those areas of the Republic where petitioners maintained their commercial business premises. (Amended Complaint, para. 3). The military incursion had an immediate and dramatic impact on the Republic. The Panamanian Defense Force ("the PDF"), which also served as its police force, was effectively eliminated. (Amended Complaint, para. 4). The United States was aware that the PDF was the sole source of police power in the Republic and, more importantly, the PDF was eliminated as a combat force by the end of the first day of the incursion—at least in the areas of Panama City where petitioners' business premises are located.[3]

Within one day the Armed Forces of the United States secured all points of transportation access to Panama City, precluding PDF

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[2]On July 10, 1992, a petition for writ of *certiorari* was filed in this Court in that action. That case arises out of the same set of facts as the instant case and involves substantially the same issues. Additionally, on September 3, 1992, a petition for writ of *certiorari* was filed in *Lindo & Maduro, S.A. v. U.S.*, No. 92-399. That case involves nearly identical issues to those presented herein.

[3]The Washington Post reported that in a press briefing held on December 20, 1989, the morning of the invasion, General Colin L. Powell, Chairman of the Joint Chiefs of Staff, stated ". . . we don't have an effective police force in Panama City either—a Panamanian police force—one of the things we would hope to get re-established fairly quickly." On December 21, 1989, The Washington Post further reported that "the PDF had functioned as a national police force, and its law enforcement effectiveness was ended by the invasion." Press reports of the invasion confirmed that by the second day of the invasion, United States Armed Forces "took control of most of Panama and shattered Noriega's Panamanian Defense Forces. . . ." The Washington Post, pp. A1, A38, December 21, 1989. (Appendix to Plaintiffs' Memorandum in Opposition to Defendant's Motion to Dismiss ("App. to Pls.' Opp."), filed August 15, 1991 in the district court).

forces in the countryside from entering.[4] Similarly, on the first day, the United States secured the PDF headquarters and other facilities in Panama City, rendering the PDF no longer an effective fighting force. The fact is that by the close of December 22, 1989, the military combat in Panama City had ceased and the United States effectively controlled the City and certainly constituted the sole source of effective power in the area.[5] Although only hours before the incursion the United States recognized a new government of Panama, the newly constituted government had no visible means to enforce law and order except United States troops and military police.

The United States failed to exercise its police power obligations assumed under the Hague Convention Regulations. (Amended Complaint, para. 5). As a result of decisions made in the United States, (*see* Amended Complaint, para. 2), the government "... failed to provide adequate numbers of police personnel, equipment and orders to protect..." petitioners' property from extensive looting by Panamanian civilians. (Amended Complaint, para. 5).

Consequently, and for a considerable period of time, the veneer of civilization was stripped from Panama City. The chaos

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[4]The entire operation was summarized on December 21, 1989 in The New York Times. Army and Marine units isolated and then destroyed the PDF Headquarters in Panama City. Other American units secured the Bridge of the Americas and the Avenue of the Martyrs closing access to the west of Panama City and accross the Canal. Fort Amador to the south was isolated and then taken. American paratroopers and Rangers seized the International Airport to the north of the City and blocked the Pacora River Bridge to the east. The New York Times, p. A 20, December 21, 1989. (App. to Pls.' Opp.).

In point of fact, these operations were a military success of great magnitude. Moreover, and perhaps because of the speed and efficiency of the operation, no significant attempt was made by the PDF to come to the aid of its forces in Panama City, or other areas of the former Canal Zone. They were either eliminated, captured or simply surrendered as the United States forces moved out and gained effective control of the entire Republic within a few short days. On December 22, 1989, The New York Times reported President George Bush as declaring "the military phase of the Panama operation [is] 'pretty well wrapped up'." The New York Times, p. A1, December 22, 1989. (App. to Pls.' Opp.).

[5]Lt. Col. James L. Swank is quoted on that date as saying "the PDF has virtually ceased to exist as a combat organized force" and that the United States was "actually taking over the law and order function in Panama City." The Washington Post, p. A31, December 22, 1989. (App. to Pls.' Opp.).

that ensued is not a pretty picture. Large and unarmed mobs began wholesale looting of petitioners' and other commercial premises. The worst damage occurred in the period immediately following seizure of the city, but in some cases extended into January, 1990.

REASONS FOR GRANTING THE WRIT

The issues raised in this case are of first impression in this Court regarding the proper interpretation of the Hague Convention IV of 1907 and its Annexed Regulations, 36 Stat. 2277 *et seq.*[6] The United States was the motivating force for the conference and the treaty ultimately adopted by 64 nations. Resolution of the issues presented will have a profound effect on the treaty's interpretation throughout the world.

1. Petitioners, private Panamanian corporations, alleged in their complaints for a cause of action that the United States military forces violated article 43 of the Annexed Regulations to the Hague Convention IV of 1907 by failing to provide police protection of their property in the zone occupied by U.S. forces in the aftermath of the U.S. invasion of Panama in December, 1989. Article 43, which imposes a mandatory duty to provide such protection, states:

> **Article 43.** The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.

Hague Convention IV, 1907, Annexed Regulations, article 43, 36 Stat. 2277, 2306.

Under international law, "[o]ccupation . . . comes into being when the enemy government has been rendered incapable of exercising its authority in a given area." Von Glahn, *Law Among Nations* 665-666 (MacMillan Publishing, 3d ed. 1976). "Military occupation is a question of fact." U.S. Army Field Manual FM

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[6]*See* note 2, *supra*.

27-10, *The Law of Land Warfare* §§ 355, 358 (1956); III Hyde, *International Law* 1876, 1877 (Little, Brown & Company, 2d ed. 1947).[7]

The United States has followed a policy of adherence to the Hague Convention since its inception. In a United States Diplomatic Note of November 10, 1950, the United States protested Soviet interference with and failure to control mob violence in the Soviet zone of occupied Austria. 1 Whiteman, *Digest of International Law* 970, 992-994 (1963). The importance of this policy cannot be ignored. The note to the Soviets is contrary to the policy adopted by the government in this case.

Secretary of State Acheson, in a Diplomatic Note to the Yugoslov Ambassador dated March 27, 1947, stated:

> The Government of Yugoslovia will be aware of the well established principle of international law prohibiting the confiscation of private property by the occupying power administering military government in occupied territory and the obligation to respect and protect the legitimate rights and interests of the population.

Id., at 960.

Mr. Hackworth, as Legal Adviser of the Department of State, wrote on May 7, 1936, "[a] military occupant, especially one who had conquered and subjugated a country, has supreme power over the territory occupied, and, to all intents and purposes, is the sovereign during the period of occupation." 1 Hackworth, *Digest of International Law* 156 (1940).

This Court in *In Matter of Yamashita*, 327 U.S. 1 (1946), upheld the criminal conviction of the Japanese commander of the Philippines during World War II for violating article 43 of the Annexed Regulations to the Hague Convention IV of 1907.

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[7]These police power obligations are referenced in the field manuals under which American Forces conduct belligerent operations. *See* U.S. Army Field Manual FM 27-10, *The Law of Land Warfare*, § 358 (1956), which states:

> . . . [M]ilitary occupation confers upon the invading force the means of exercising control of the period of occupation. . . . The exercise of these rights results from the established power of the occupant and *from the necessity of maintaining law and order, indispensable both to the inhabitants and the occupying force.* (Emphasis added).

The conduct of the contracting parties to a treaty must be given great weight. The United States has in the past met its duty under article 43 of the Hague Convention. This prior conduct, as previously noted, is important in the application of article 43 to the Panamanian invasion. In *Trans World Airlines v. Franklin Mint Corp.*, 466 U.S. 243, 104 S. Ct. 1776, 1786 (1984), Justice O'Connor, speaking for the Court, said in interpreting the Warsaw Convention:

> We may not ignore the actual, reasonably harmonious practice adopted by the United States and other signatories in the first 40 years of the Convention's existence. [Citations omitted] In determining whether the Executive Branch's domestic implementation of the Convention is consistent with the Convention's terms, our task is to construe a "contract" among nations. The conduct of the contracting parties in implementing that contract in the first 50 years of its operation cannot be ignored.

Id., 104 S. Ct. at 1786.

The Diplomatic Notes from the United States must be given great weight in interpreting the treaty. "[I]n resolving doubts the construction of a treaty by the political department of the government, while not conclusive upon courts called upon to construe it, is nevertheless of weight." *Factor v. Laubenheimer*, 290 U.S. 276, 295 (1933).

The rights and obligations of an occupying force were recognized by this Court long before the Hague Convention of 1907. In *United States v. Rice*, 4 Wheat 246 (1819), Justice Story held for the Court that British military forces were entitled to collect duties in occupied Maine during the War of 1812.

a. Since the United States violated its mandatory duty under article 43 of the Hague Convention annexations, petitioners are entitled to damages under article 3 of the Hague Convention, which provides:

> A belligerent party which violates the provisions of the said regulations shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by

persons forming part of its armed forces. 36 Stat. 2277, 2290.

The Hague Convention is self-executing. A self-executing treaty is one which, of its own force, confers rights on individuals without the need for any implementing legislation. A cause of action brought by private parties for violation of a treaty was recognized by this Court in *United States v. Schooner Peggy*, 1 Cranch 103 (1801), where the Court upheld the provisions of a treaty with France in reversing the condemnation of a French vessel. Chief Justice Marshall, speaking for the Court, stated:

> The constitution of the United States declares a treaty to be the supreme law of the land. Of consequence, its obligation on the courts of the United States must be admitted. It is certainly true that the execution of a contract between nations is to be demanded from, and in the general, superintended by, the executive of each nation; and, therefore, whatever the decision of this court may be relative to the rights of parties litigating before it, the claim upon the nation if unsatisfied, may still be asserted. But yet where a treaty is the law of the land, and as such affects the rights of parties litigating in court, that treaty as much binds those rights, and is as much to be regarded by the court, as an act of congress; and although restoration may be an executive, when viewed as a substantive act, independent of, and unconnected with, other circumstances, yet to condemn a vessel, the restoration of which is directed by a law of the land, would be a direct infraction of the law, and, of consequence, improper.

Id., at 107.

The obvious intent of the parties to this multi-lateral agreement was the protection of individuals.[8] This treaty deals with

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[8]The Final Act of the Second International Peace Conference, as referred to the Senate Committee on Foreign Relations on February 27, 1908, at p. 182, states:

> The Second International Peace Conference, proposed in the first instance by the President of the United States of America, having been convoked, on the invitation of His Majesty the Emperor of All the Rus-

human rights. The Senate Committee Report on Foreign Relations, at p. 98, on the Laws and Customs of War on Land in the Hague Convention states:

> According to the views of the High Contracting Parties, these provisions, the wording of which has been inspired by the desire to diminish the evils of war, as far as military requirements permit, are intended to serve as a general rule of conduct for the belligerents in their mutual relations *and in their relations with the inhabitants*. (Emphasis added).

Treaties dealing with the protection of human rights by their nature accord rights to individuals. This is in direct contrast with treaties such as disarmament, which clearly accord no individual rights and govern only relations between nations.

Petitioners are in the nature of third party beneficiaries under the Hague Convention IV of 1907. Under American law it is well established that a third person may enforce a promise made for his benefit even though he is a stranger both to the contract and to the consideration. *Austin v. Seligman*, 18 F. 519 (2d Cir. 1893). The determining factor as to the rights of a third party beneficiary is the intention of the parties who actually made the contract. *Ohio Casualty Ins. Co. v. Beckwith*, 74 F.2d 75 (5th Cir. 1935). The real test is whether the contracting parties intended that a third person should receive a benefit which might be enforced in the courts. *Pennsylvania Cement Co. v. Bradley Const. Co.*, 7 F.2d 822 (2d Cir. 1925). *See also* Williston on Contracts § 359; Restatement of Contracts § 135-139.

A treaty is a contract between nation states. In the case at bar the obvious intent of the parties was to provide civil protection to civilians. Under American municipal corporation law, a citizen may sue under a contract entered into between the municipality and another party if the intent was to afford the citizens

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sias, by Her Majesty the Queen of the Netherlands, assembled on the 15th June, 1907, at The Hague, in the Hall of the Knights, *for the purpose of giving a fresh development to the humanitarian principles* which served as a basis for the work of the First Conference of 1899. (Emphasis added).

that benefit. *People v. Suburban R. Co.*, 178 Ill. 594, 53 N.E. 349 (1899).

b. The question of self-execution in this instance, however, may be mooted by the two Diplomatic Notes submitted by the Republic of Panama (apps. A18-A27) in which the issues of compensation are submitted to this Court for resolution. By submitting the matter to the United States courts, the Republic of Panama is acting in *parens patriae* to petitioners. The government tried to exclude the notes from judicial consideration. The Court of Appeals ignored the Notes. The effect of those Notes on this litigation should be addressed by this Court because it involves an important question regarding the impact of treaty interpretation under the Constitution.

The first Note was presented by the Government of Panama to the United States on August 19, 1991. The Note states that the Government of Panama is aware that private Panamanian citizens have brought lawsuits in the United States under the Hague Convention to obtain compensation for economic losses suffered following the 1989 invasion of Panama. The Note clearly supports the objective of the lawsuits and urges the United States to "carefully consider the reasons which motivated the filing of the lawsuits, such being to assure that those who suffered the destruction of their property may obtain just and equitable compensation." (App. A21). On January 21, 1992, the Government of Panama presented its second Note to the United States concerning private party, Hague Convention damage claims. (Apps. A22-A27).

The Government of Panama has expressed its views on the application of the Hague Convention. While those views are not necessarily dispositive, they are entitled to substantive consideration on the merits by this Court, along with the other matters of record. *See Sumitomo Shoji American, Inc. v. Avagliano*, 457 U.S. 176 (1982). Petitioners urge the Court to grant review to give consideration to the request.

c. Petitioners contend further that the clear, plain language of article 3 is a waiver of sovereign immunity for violations of the provisions of the Hague Convention, especially when viewed alongside the Alien Tort Claim Act ("ATCA"). The ATCA enhances article 3's self-execution. The ATCA provides that "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of

nations or a treaty of the United States." 28 U.S.C. § 1350 (1976). The law was first passed by Congress in the first Judiciary Act of 1789. It was readopted by Congress on March 3, 1911. *See* c. 231, § 24, para. 17, 36 Stat. 1091, 1093. This was only two years after the Hague Convention was ratified by President Taft on February 23, 1909. 1 Bevans 631. Readoption of section 1350 followed on the heels of the United States' voluntary decision to be bound by the international precepts afforded by the treaty. The inference can be clearly drawn that section 1350 reflects the enhancement of the important provisions appearing in the treaty. If sovereign immunity was not intended to be waived by article 3, that provision would be unnecessary.

A significant characteristic of article 3 is that it expressly incorporates liability encountered through traditional agency principles, specifically for those acts committed by a belligerent party's armed forces personnel. This is consistent with the treatment of General Yamashita in *In Matter of Yamashita*, *supra*, where the general himself did not personally engage in the atrocities committed by his troops, yet was sentenced to death and hanged.

The Court of Appeals, relying upon *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428 (1989), and the *Head Money Cases*, 112 U.S. 580 (1884), held that the language of the treaty only set forth substantive rules of conduct and did not create private rights. The Court of Appeals held further that sovereign immunity had not been waived.

The *Argentine Republic* case deals with far different issues than those in the case at bar. That case turned upon congressional intent of the Foreign Sovereign Immunity Act, not upon the Hague Convention. The Court below took language out of context to support its decision. The *Head Money* cases were decided long before the Hague Convention was adopted or ratified. An ancillary issue in that case was whether an act of Congress regulating immigration conflicted with a treaty. That is not the issue in this case. This "bootstrap" rationale by the Court of Appeals has the effect of creating new and important principles of treaty law without full consideration. The *rationale decindi* has no substance.

The question of what impact ratification of a treaty has on sovereign immunity is a question that deserves full briefing and analysis. Sovereign immunity is an ancient and important princi-

ple of law. Nonetheless, it is bandied about in judicial opinions without adequate discussion of the analysis that went behind it. Any time a nation-state enters into a treaty it relinquishes a certain amount of sovereign immunity. The degree of that relinquishment is dependent upon the intent of the parties, and the language that is used. In the Hague Convention, use of the command "shall" is made and not of the discretionary "may." Yet, the courts below have interpreted this treaty such that compliance therewith is discretionary. This is a radical departure from accepted principles of American jurisprudence. Such a radical departure provides an important reason for this Court to grant *certiorari*.

2. Petitioners do not rely solely upon the Hague Convention for providing a cause of action. Petitioners' action is also grounded in tort under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 1346(b), 2671-2680.

The Court of Appeals applied the FTCA in a manner inconsistent with prior decisions of this Court and expanded its exceptions far beyond those enunciated by Congress. Grant of this petition will enable the Court to correct an injustice and clarify the law.

This Court recognized in *Indian Towing Company v. United States*, 350 U.S. 61, 68 (1955), that the purpose of the FTCA is "to compensate the victims of negligence in the conduct of governmental activities in circumstances like unto those in which a private person would be liable. . . ." In *Indian Towing*, liability under the FTCA was upheld for negligence in the performance of a governmental public safety function, specifically the maintenance of a lighthouse. Likewise, in *Rayonier, Inc. v. United States*, 352 U.S. 315 (1957), liability under the FTCA was upheld for negligence in performing another governmental public safety function, in that case firefighting. The premise of both decisions is that once the United States assumes a duty of care, its liability under the FTCA is determined as if the public safety or other function is being performed by a private or non-governmental party.[9]

As stated in *Indian Towing*:

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[9]For another instance where federal duties have been adjudged appropriate in an FTCA action, be it a question of preemption or choice of law rules, *see United*

> The Coast Guard need not undertake the lighthouse service. But once it exercised its discretion to operate a light . . . and engendered reliance on the guidance afforded by the light, it was obligated to use due care to make certain that the light was kept in good working order; and, if the light did become extinguished, then the Coast Guard was further obligated to use due care to discover this fact and to repair the light or give warning that it was not functioning. If the Coast Guard failed in its duty and damage was thereby caused . . ., the United States is liable under the Tort Claims Act.

350 U.S. at 69.

The Hague Convention regulations create a duty of care that the United States has voluntarily assumed. This duty of care is not at all unlike the situation when a private party assumes a duty to protect against criminal or other unlawful action, either by contract or otherwise. In such a situation, there is an exception to the ordinary rule that there is no legal duty to protect another person against criminal or unlawful conduct by third parties.[10]

The long history of compliance by the United States with article 43 cannot be ignored. In the past it has assumed that duty and attempted to do so here. Somehow the United States blundered in this case. It attempted to fulfill its duty but negligently failed to do so. The United States did send military police to Panama, but for reasons known only to the Pentagon, they failed to perform that duty.

States v. Muniz, 374 U.S. 150, 164-5 (1963) (duty of care owed to federal detainees by Bureau of Prisons established by 18 U.S.C. § 4042).

[10]The Courts of the District of Columbia have adopted the common law principle that a voluntary undertaking of a protective action carries with it a duty of reasonable care. In *Remeikis v. Boss & Phelps, Inc.*, 419 A.2d 986, 991 (App. D.C. 1980), the Court citing *Glanzer v. Shepard*, 233 N.Y. 236, 135 N.E. 275, 276 (1922) and *Security National Bank v. Lish*, 311 A.2d 833, 834 (App. D.C. 1973), said: " '. . . [O]ne who assumes to act, even though gratuitously, may thereby become subject to the duty of acting carefully.' " *See also Gerace v. Liberty Mutual Insurance Co.*, 264 F. Supp. 95, 97 (D.D.C. 1966). The law in Virginia, where the Pentagon is located, is the same. *See Vandergrift v. United States*, 500 F. Supp. 229, 233 (E.D. Va. 1978) (FTCA action; "When an agency of the United States undertakes a task, it must perform the task with due care. . . . The Virginia law is the same. . . . One is entitled to assume another party will perform his duty. . . ." (Citations omitted).

Underlying *Indian Towing* and *Rayonier* is the accepted tort principle that a duty of care can be voluntarily assumed as well as imposed by law. Where the performance of a function involving a duty of care is voluntarily assumed by the government, a breach of the assumed duty is actionable in tort as it is for the breach of the ordinary duty of reasonable care imposed by common law.

The Hague Convention imposes special duties and obligations voluntarily assumed by the United States in this case. Tort law principles brought under the mechanisms provided by the FTCA render petitioners' suit actionable.

Under the FTCA the United States has waived sovereign immunity. The exceptions to the FTCA's waiver of sovereign immunity do not, based upon the facts in this case, bar the action. Thus, the Court of Appeals erred in holding that the discretionary function exception applies.

The applicable statutory language for the "discretionary function," "foreign country" and "combatant activities" exceptions is:

> The provisions of this chapter and section 1346(b) of this title shall not apply to—
>
> (a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.
>
> * * *
>
> (j) Any claim arising out of combatant activities of the military or naval forces, or the Coast Guard, during time of war.
>
> (k) Any claim arising in a foreign country.

28 U.S.C. § 2680.

a. The Court of Appeals misconstrued *Berkovitz v. U.S.*, 486 U.S. 531 (1988). Because of that misconstruction, it has injected complete confusion into the applicability of the discretionary function exception. The discretion provision of the FTCA applies to the formulation of regulations for specifications. However, where a treaty, statute or regulation sets forth a specific duty, there is no discretion and Section 2680(a) does not apply.

In *Berkovitz*, the Court held that the discretionary function exception is no bar where its exercise "would violate a specific statutory and regulatory directive." 486 U.S. at 542. The dictate of *Berkovitz* clashes head on with the holding of the district court and the Court of Appeals in this case.

In the case at bar, the mandatory requirements of the Hague Convention preclude the government from relying upon the discretionary defense because the Hague Convention *required* the United States to "take all measures in [its] power to restore, and ensure, . . . public order and safety." *See* Hague Convention IV, 1907, art. 43, Annexed Regulations, 36 Stat. 2277, 2306. (App. A16). It is clear that the negligence alleged in this case does not involve the formulation of policy or the performance of any quasi-legislative or quasi-judicial functions. It involves the operational aspects of applying an already established law.

b. The negligence alleged in this case is not a failure by Armed Forces personnel in the Republic of Panama to use due care in the performance of the police power functions assigned to them on foreign soil. The negligence on which this action is based is the failure by the United States personnel located in Washington and the Pentagon who were in command of the military incursion to provide sufficient police protection after occupation. This sort of claim, which is referred to in *Beattie v. United States*, 756 F.2d 91 (D.C. Cir. 1984), as a "headquarters claim," is precisely the type of negligence that falls outside of the "foreign country" exception in that the negligence occurs in the United States although its "operative effect" is felt on foreign soil. *See Beattie v. United States*, 756 F.2d at 96.

As supported by the legislative history of the FTCA, the District of Columbia Circuit has held that negligent acts or omissions occurring in the United States are actionable even though the damage or injury occurs in a foreign country. Negligence is also actionable under the FTCA when it involves an operational

police function. *Sami v. United States*, 617 F.2d 755, 768 (D.C. Cir. 1979); *Beattie v. United States*, 756 F.2d at 94-98.

The principles in *Sami* and *Beattie* were never mentioned by the Court of Appeals in its opinion. In *Sami*, the negligence alleged was improper instructions to a foreign government to arrest and detain the plaintiff. Those instructions were given in the United States. Their "operative effect," *i.e.*, the damage or injury, occurred in Europe. The Court of Appeals in *Sami*, relying on the related legislative purpose for the exception and this Court's decision in *United States v. Spelar*, 338 U.S. 217 (1940), held that the "foreign country" exception "does not apply if the wrongful acts or omissions complained of occur in the United States." *Sami v. United States*, 617 F.2d at 762. *See also Spelar*, 338 U.S. at 220-221.

The *Beattie* decision is also significant in that it addresses the underlying legislative history and purpose of the FTCA's "foreign country" exception. There the Court, citing *Spelar*, pointed out that the legislative intent underlying the exception is to prevent the FTCA liability of the United States from being determined under foreign law, which would be the case under *lex loci delicti* conflicts of law principles when the negligent acts or omissions occur on foreign soil. As the *Beattie* Court said,

> [T]he legislative will seems to be as the Supreme Court summarized in *Spelar*, that though Congress was ready to lay aside a great portion of the sovereign's ancient and unquestioned immunity from suit, it was unwilling to subject the United States to liabilities depending upon the law of a foreign power.

Beattie v. U.S., 756 F.2d at 95. The *Beattie* Court, after discussing the legislative intent, went on to cite *Sami* and refer to it and other cases as illustrating the principle that:

> [A]n FTCA claim may arise in the United States, because the negligent act or omission occurred here, even though the act or omission has its 'operative effect', *i.e.*, the injury occurred, in a foreign country.

Beattie v. U.S., 756 F.2d at 96.

Other authorities in accord with *Sami* and *Beattie* abound. Indeed, as the Court said in *Sami*, "no case to our knowledge has held the United States exempt from liability for acts or omissions occurring here which have their operative effect in another country." *Sami v. United States*, 617 F.2d at 762. The case analysis in the *Sami* opinion demonstrates that the "operative effects" cases are, if anything, settled law. *See Leaf v. United States*, 588 F.2d 733 (9th Cir. 1978) (holding that the "foreign country" exception does not apply to negligence alleged to have occurred in the United States with the resultant damage occurring in Mexico); *In Re Paris Air Crash of March 3, 1974*, 399 F. Supp. 732 (C.D. Cal. 1975) (holding that the exception does not apply in a similar situation involving alleged domestic negligence causing damage on foreign soil). *See also Roberts v. United States*, 498 F.2d 520, 522 n.2 (9th Cir.), *cert. den.*, 419 U.S. 1070 (1974); *Bronson v. United States*, 463 F. Supp. 908 (E.D. Pa. 1978). In the case at bar, there is no suggestion of the application of Panamanian law or the Civil Code. Here the application is clearly of American law.

c. Neither the alleged negligence in this case, *i.e.*, the failure to provide adequate police protection, nor the resultant injury, *i.e.*, damages caused by civilian looting, involve combatant activities. This FTCA exception to the waiver of sovereign immunity, section 2680(j), has infrequently been the subject of judicial construction, and Congress' deliberations on the FTCA provide no guidance as to the intent underlying the exception. Nonetheless, as was pointed out in *In Re "Agent Orange" Product Liability Litigation*, 580 F. Supp. 1242, 1255 (E.D.N.Y. 1984), the case law and commentators agree that the exception is to be "interpreted very narrowly."

Analysis of the exception by one commentator concludes that the statutory language "combat activities" means only "operations . . . directly connected with engaging the enemy." Note, *The Federal Tort Claims Act*, 56 Yale L.J. 534, 549 (1947). In 2 Jayson *Handling Federal Tort Claims* § 262 (1989), it was opined that the statutory language requires that the injury complained of arise from "actual hostilities and physical violence." Likewise, " 'combat activities' . . . means the actual engaging in the exercise of physical force." *Skeels v. United States*, 72 F. Supp. 372, 374 (W.D. La. 1947), *quoted in*, *In re "Agent Or-*

ange'' Product Liability Litigation, 580 F. Supp. at 1255. It also bears mention that these interpretations of the exceptions are in full accord with the statute, which provides for the exception only when the damage arises from ''combatant activities . . . during time of war.'' 28 U.S.C. § 2680(j).

The subject matter of the Panama civilian looting claims is far removed from the narrow confines of the ''combatant activities'' exception. The district court in *In Re ''Agent Orange'' Product Liability Litigation* observed that the mere fact that an injury is somehow related to combat is not the test to determine the applicability of the exception. The exception applies only if the injury is alleged to be caused by negligence in performing a *combat function:*

> Consistent with the well-settled interpretation of the foreign claims exemption, what must arise from the combat activities is not a ''claim'' but ''an act or omission of an employee of the government.'' Thus, for example, if a civilian was injured on a battlefield by a grenade that exploded prematurely because the government's specifications for the grenade were improper, that civilian should not be barred by the combat activities exemption from suing. On the other hand, if a soldier was aiming the grenade at the enemy and, as a result of his negligence, a civilian was injured, the combat activities exception would apply.

Id., at 1255.

Neither the foreign country exception nor the combat activities exception in the FTCA have been previously addressed by this Court.

Given the importance of these questions, petitioners urge this Court to grant review of the decision and orders below resulting in dismissal of their actions.

CONCLUSION

WHEREFORE, for the foregoing reasons, petitioners pray that this Court issue a writ of *certiorari* to the Court of Appeals for the Fourth Circuit.

Respectfully submitted,

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APPENDIX

PUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 91-2229

GOLDSTAR (PANAMA) S.A., *et al.*,
Plaintiffs-Appellants,

v.

UNITED STATES OF AMERICA,
Defendant-Appellee.

LINDO & MADURO, S.A., *et al.*,
Amici Curiae.

Appeal from the United States District Court
for the Eastern District of Virginia, at Alexandria.
Albert V. Bryan, Jr., Senior District Judge.
(CA-91-725-A)

Argued: March 4, 1992

Decided: June 16, 1992

Before ERVIN, Chief Judge, NIEMEYER, Circuit Judge, and RAMSEY, Senior United States District Judge for the District of Maryland, sitting by designation.

Affirmed by published opinion. Chief Judge Ervin wrote the opinion, in which Judge Niemeyer and Senior Judge Ramsey joined.

COUNSEL

ARGUED: Douglas B. McFadden, MCFADDEN, EVANS & SILL, Washington, D.C., for Appellants. John S. Koppel, Civil

Division, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellee. **ON BRIEF:** James A. Kline, IV, MCFADDEN, EVANS & SILL, Washington, D.C., for Appellants. Stuart M. Gerson, Assistant Attorney General, Douglas Letter, Civil Division, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C.; Richard Cullen, United States Attorney, Theresa C. Buchanan, Assistant United States Attorney, Alexandria, Virginia; Lt. Col. Philip Lynch, Torts Branch, DEPARTMENT OF THE ARMY, Arlington, Virginia, for Appellee. Allan I. Mendelsohn, Marvin L. Szymkowicz, LAW FIRM OF ALLAN I. MENDELSOHN, Washington, D.C., for Amici Curiae.

OPINION

ERVIN, Chief Judge:

Plaintiffs-appellants, a group of Panamanian businesses (collectively, "Goldstar"), appeal from the district court's dismissal of their action for lack of subject matter jurisdiction. Goldstar claims that the United States Government is liable for damage to the property of various Panamanian businesses that occurred as a result of looting and rioting in the wake of the United States' invasion of Panama. Finding that the United States has not waived its sovereign immunity against law suits of this nature, we affirm the dismissal of this case.

I.

Because the court below dismissed this case pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure, for lack of subject matter jurisdiction, we accept the facts, as alleged in Goldstar's amended complaint, as true. *See, e.g., Finlator v. Powers*, 902 F.2d 1158, 1160 (4th Cir. 1990). These facts are as follows.

The armed forces of the United States invaded Panamanian territory on December 20, 1989, and "occupied, pacified, and controlled" an area of Panama City, Panama, containing the businesses owned by the plaintiffs. Amended Complaint at 6. The occupation continued until approximately January 10, 1990. During the period of occupation, the Panamanian Defense Force (the

"PDF"), which also served as Panama's police force, was effectively eliminated. The United States was aware that the PDF was the sole source of police protection within Panama.

Units of the United States armed forces attempted to provide police protection to civilians within Panama City. However, the United States Government had, allegedly, negligently failed to provide adequate personnel, equipment, an orders to protect the residents and businesses of Panama City. Because of the inadequacy of the United States' efforts, uncontrolled mobs were allowed to loot the commercial establishments of the plaintiffs and other Panamanian businesses.

Goldstar commenced the present action in United States District Court for the Eastern District of Virginia on May 23, 1991, alleging violations of the Hague Convention which, Goldstar argued, imposed a duty on the United States to provide protection for the residents of an occupied territory. On August 2, 1991, the United States moved to dismiss on a number of jurisdictional grounds. On September 6, 1991, the district court dismissed the case, holding that the action fell within certain exceptions to the Federal Tort Claims Act ("FTCA"), 28 U.S.C. 1346(b), and therefore, that the court was without subject matter jurisdiction to hear the case. Goldstar filed a timely appeal.

II.

As a general proposition, the United States is subject to suit only to the extent that it has explicitly waived its sovereign immunity. *See Block v. North Dakota*, 461 U.S. 273, 287 (1983). The subject matter jurisdiction of the federal courts is defined by any conditions the United States attaches to its waiver of immunity. *Lehman v. Nakshian*, 453 U.S. 156, 160 (1981).

Goldstar asserts two theories upon which the United States could be found to have waived its immunity for suits such as the present case. We will address each theory in turn.

A

Goldstar's first contention is that jurisdiction is proper under the Alien Tort Statute, 28 U.S.C. § 1350. That provision states:

"The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." *Id.* While this statute would facially appear to grant jurisdiction for Goldstar's action, the Alien Tort Statute has been interpreted as a jurisdictional statute only—it has not been held to imply any waiver of sovereign immunity. *Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 207 (D.C. Cir. 1985); *Canadian Transp. Co. v. United States*, 663 F.2d 1081, 1092 (D.C. Cir. 1980). Thus, any party asserting jurisdiction under the Alien Tort Statute must establish, independent of that statute, that the United States has consented to suit.

Goldstar contends that the United States has waived sovereign immunity under the provisions of the Hague Convention, a multilateral international treaty to which the United States is a signatory. The relevant provision of that document states, "A belligerent party which violates the provisions of the said Regulations shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces." Hague Convention Respecting the Law and Customs of War on Land, 1907, art. 3, 36 Stat. 2277, 2290. The "Regulations," referenced by the treaty, contain a provision relating to the circumstance in which one nation occupies the territory of another:

> The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.

Hague Convention, Annexed Regulations, art. 43, 36 Stat. at 2306. Under Goldstar's theory, the United States failed to comply with the duty imposed on occupying nations by Article 43 of the Hague Convention.* Accordingly, Goldstar contends that the United States is liable for compensation under Article 3 of the Convention,

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*The parties dispute whether or not Panama was "occupied" by the United States as contemplated by the Hague Convention. Because we believe that the Hague Convention cannot be construed as a self-executing waiver of sovereign immunity, and therefore that it cannot avail Goldstar in any event, we will assume, for purposes of this discussion, that the United States was an "occupying power."

and that Article 3 must be interpreted as a self-executing waiver of sovereign immunity with regard to such claims.

International treaties are not presumed to create rights that are privately enforceable. *See Head Money Cases*, 112 U.S. 580, 598-99 (1884); *Foster v. Neilson*, 27 U.S (2 Pet.) 253, 314 (1829). Courts will only find a treaty to be self-executing if the document, as a whole, evidences an intent to provide a private right of action. *United States v. Thompson*, 928 F.2d 1060, 1066 (11th Cir.), *cert. denied*, 116 L. Ed. 2d. 222 (1991); *Diggs v. Richardson*, 555 F.2d 848, 851 (D.C. Cir. 1976). The Hague Convention does not explicitly provide for a privately enforceable cause of action. Moreover, we find that a reasonable reading of the treaty as a whole does not lead to the conclusion that the signatories intended to provide such a right.

Significantly, the United States Supreme Court has recently construed a provision of the Geneva Convention similar to the presently contested Hague Convention language. The Geneva Convention provides that an illegally boarded merchant ship "shall be compensated for any loss or damage that may have been sustained." Geneva Convention of the High Seas, Apr. 29, 1958, art. 22(3), 13 U.S.T. 2312, 2319. Interpreting this language, the Supreme Court found that the "conventions . . . only set forth substantive rules of conduct . . . . They do not create private rights of action . . . ." *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 442 (1989). We can discern no reason why the Hague Convention language, at issue in the present case, should be construed any differently.

Furthermore, Article 1 of the Hague Convention states, "[t]he Contracting Powers shall issue instructions to their armed land forces which shall be in conformity with the Regulations . . . ." Hague Convention, art. 1, 36 Stat. at 2290. This language must be taken as further evidence that the Hague Convention is not self-executing, and that, instead, the signatories contemplated that individual nations would take subsequent executory actions to discharge the obligations of the treaty.

In sum, we hold that the Hague Convention is not self-executing and, therefore, does not, by itself, create a private right of action for its breach. As a result, we find that neither the Hague Convention nor, derivatively, the Alien Tort Statute, constitutes a waiver of sovereign immunity for the type of action advanced by

Goldstar. Accordingly, Goldstar cannot establish subject matter jurisdiction under the terms of the Alien Tort Statute.

B.

Alternatively, Goldstar contends that it can prove proper jurisdiction, including a waiver of sovereign immunity, under the terms of the FTCA. According to that statute:

> Subject to the provisions of chapter 171 of this title, the district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property . . . caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. § 1346(b). Further, section 2674 provides that the United States will be liable for tort claims "in the same manner and to the same extent as a private individual under like circumstances . . . ." 28 U.S.C. § 2674. Acting in concert, these provisions provide an explicit grant of jurisdiction and waiver of sovereign immunity for tort claims against the United States. However, as indicated in section 1346(b), the scope of the waiver is limited by certain enumerated exceptions, codified at Title 28, chapter 171, of the United States Code.

Before analyzing the relevance of these exceptions to the present case, it is necessary to make a preliminary point about the applicability of the FTCA. While the FTCA waives sovereign immunity for actions alleging torts by employees of the Government, it does not create novel causes of action. Thus, the mere allegation of a breach of duty under Federal law does not, by itself, state a valid tort claim against the Government. *See, e.g., Art Metal-U.S.A., Inc. v. United States*, 753 F.2d 1151, 1157-58 (D.C. Cir. 1985) (collecting cases).

Claims can, of course, be brought if federal law explicitly authorizes a cause of action. In that case, resort to the FTCA is un-

necessary. The FTCA only serves to convey jurisdiction when the alleged breach of duty is tortious under *state* law, or when the Government has breached a duty under federal law that is analogous to a duty of care recognized by state law. *See* 28 U.S.C. § 2674; *Rayonier, Inc. v. United States*, 352 U.S. 315, 318 (1957) (United States would be liable for breach of federal law standard if state law "would impose liability on private persons or corporations under similar circumstances"); *Art Metal*, 753 F.2d at 1158 ("The pertinent inquiry is whether the duties set forth in the federal law are analogous to those imposed under local tort law.").

In the present case, Goldstar alleges that the United States breached a duty arising under the Hague Convention, which, as an international treaty, is equivalent to federal law. As discussed above, the Hague Convention cannot be considered self-executing and, therefore, does not independently provide a cause of action. Consequently, in order to prevail on a claim predicated upon the United States' Hague Convention duty, Goldstar must show that the duty breached by the United States was analogous to a duty imposed by the law of the forum state—in this case, Virginia. Clearly, there is no tort under Virginia law for failing to protect the property of another from the illegal actions of third parties. Thus, to the extent that Goldstar argues that the United States had a mandatory duty, imposed by the Hague Convention, to provide police protection to Panama, Goldstar's claim is not cognizable under the FTCA, because there is no such analogous duty under Virginia state law.

Goldstar circumvents this problem by alleging that even if there was no mandatory duty under the Hague Convention to provide police protection, the United States, by voluntarily undertaking to provide such protection, created a duty to exercise due care in providing that service. *See Vandergrift v. United States*, 500 F. Supp. 229, 233 (E.D. Va. 1978) ("When an agency of the United States undertakes a task, it must perform the task with due care. The Virginia law is the same." (citations omitted)). Goldstar contends that this voluntarily assumed duty provides an actionable cause under the FTCA. However, this argument, while saving Goldstar's complaint under the threshold requirements of the FTCA, simultaneously dooms the action under the FTCA's enumerated exceptions.

Under these exceptions, Congress has barred from the scope of the FTCA "[a]ny claim . . . based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." 28 U.S.C. § 2680(a). By arguing, as it must, that the provision of police protection was voluntarily assumed by the United States Government, and not mandatorily imposed by the Hague Convention, Goldstar has placed this case squarely within this discretionary function exception to the FTCA.

The Supreme Court has held that the discretionary function exception applies when 1) the relevant conduct involves an element of judgment or choice on the part of the Government actor and 2) the conduct involves considerations of public policy. *Berkovitz v. United States*, 486 U.S. 531, 536-37 (1988); *see also Piechowicz v. United States*, 885 F.2d 1207, 1211-12 (4th Cir. 1989). In this case, there can be no doubt that decisions regarding the logistics of the military operations in Panama, including proper allocation of personnel, were matters of delicate public policy. Thus, the critical inquiry on this question concerns whether the decision-makers in the United States Government, in determining the proper level of police protection to provide to the Panamanian civilians, faced decisions involving elements of judgment or choice.

If Goldstar's claim was based on the contention that a certain quantum of protection was mandated by the express terms of the Hague Convention, then, at least arguably, Goldstar could advance the proposition that the provision of that protection was not a discretionary matter. According to the *Berkovitz* Court, "the discretionary function exception will not apply when a federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow. In this event the employee has no rightful option but to adhere to the directive." 486 U.S. at 536. Because Goldstar cannot rely on the Hague Convention to establish an actionable duty of care, however, there is no "directive" to which the United States policy-makers can be bound. In the absence of an expressly articulated standard to limit the Government's discretion in this matter, it is impossible to find that the Government's decisions were anything but purely discretionary. *See Monarch Ins. Co. v. District of Columbia*, 353 F. Supp. 1249, 1258 (D.D.C. 1973) (discretionary function exception bars claims challenging adequacy of police forces assigned in connection with looting episodes fol-

lowing the assassination of Dr. Martin Luther King), *aff'd*, 497 F.2d 684 (D.C. Cir.), *cert. denied*, 419 U.S. 1021 (1974); *Smith v. United States*, 330 F. Supp. 867, 869 (E.D. Mich. 1971) (discretionary function exception applies because "[t]he means and method of restoring order in a city faced with anarchy and breakdown of civilian authority are delegated to the Executive Branch of the Government, not the judiciary").

Accordingly, we find, as did the district court, that the discretionary function exception, 28 U.S.C. § 2680(a), bars application of the FTCA. *Accord Industria Panificadora, S.A. v. United States*, 957 F.2d 886, 887 (D.C. Cir. 1992) (affirming dismissal of similar claims).

III.

Having found that neither the Alien Tort Statute nor the FTCA provides the requisite waiver of sovereign immunity by the United States Government to allow Goldstar's action to proceed, we decline to address the Government's alternative argument that the action presents a non-justiciable political question. Instead, we hold that the district court correctly dismissed the case for lack of subject matter jurisdiction. The order of the district court is hereby

AFFIRMED.

FILED: July 31, 1992

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 92-1042
(CA-92-1420-A)

Mauricio Deportes, S.A.; El Dorado Importadora y Exportadora, S.A.; Farmacia Olimpica, S.A.; Ferber, S.A., Novedades Finitas; Reproducciones y Originales, S.A., y/o Reprosa El Panama, S.A.; Tejidos Raquel, S.A. (Textilindo); Comercial Del Pacifico, S.A.,

Plaintiffs - Appellants,

versus

United States of America,

Defendant - Appellee.

ORDER

The government has filed a motion for summary affirmance, appellants have filed a response to the motion, and the government has filed a reply in support of the motion.

The Court grants the government's motion for summary affirmance.

Entered at the direction of Chief Judge Ervin with the concurrence of Judge Niemeyer and Judge Ramsey, United States District Judge sitting by designation.

For the Court

/s/ Bert M. Montague

Clerk

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
June 16, 1992

No. 91-2229
CA-91-725-A

GOLDSTAR (PANAMA) S.A., *et al.*,
Plaintiffs - Appellants
v.
UNITED STATES OF AMERICA,
Defendant - Appellee
LINDO & MADURO, S.A., *et al.*,
Amici Curiae.

ORDER

Appellants filed an emergency motion to include a diplomatic note in the record on appeal.

The Court denies the motion.

Entered at the direction of Chief Judge Ervin for a panel consisting of Chief Judge Ervin, Judge Niemeyer and Judge Ramsey, United States District Judge, sitting by designation.

FOR THE COURT,

/s/ Bert M. Montague

CLERK

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
March 2, 1992

No. 91-2229
CA-91-725-A

GOLDSTAR (PANAMA) S.A., *et al.*,
Plaintiffs - Appellants
v.
UNITED STATES OF AMERICA,
Defendant - Appellee
LINDO & MADURO, S.A., *et al.*,
Amici Curiae.

ORDER

The Amici Curiae filed a motion to file a diplomatic note.

The Court denies the motion.

FOR THE COURT

/s/ John M. Greacen

CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

GOLDSTAR (PANAMA), S.A., et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	CIVIL ACTION
	)	NO. 91-725-A
UNITED STATES OF AMERICA,	)	
	)	
Defendant.	)	

ORDER

For the reasons stated from the bench, the court concluding that the claims asserted by the plaintiffs are barred because of the discretionary function exception to the Federal Tort Claims Act, which is not overcome by the alleged violation of Article 43 of the Hague Convention, it is hereby

ORDERED that the motion of the defendant to dismiss is granted, and this action is dismissed.

/s/ Albert V. Bryan, Jr.
United States District Judge

Alexandria, Virginia
September 6th, 1991

IN THE UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

SAMSUNG ELECTRONICS, PANAMA, S.A., et al.,	)	
Plaintiffs	)	
v.	)	CIVIL ACTION
	)	NO. 91-1420-A
UNITED STATES OF AMERICA,	)	
Defendants.	)	

ORDER

This case is before the court on (i) plaintiff's motion to drop certain party plaintiffs; (ii) plaintiff's motion to stay pending appellate review of *Goldstar (Panama), S.A. et. al. v. United States*, No. 91-725-A (E.D. Va.) and *Industria Panificadora, S.A. v. United States*, 763 F. Supp. 1154 (D.D.C. 1991); and (iii) defendant's motion to dismiss. Upon consideration of the parties' submissions, it is hereby ORDERED that:

1) Plaintiff's uncontested motion to drop certain party plaintiffs is GRANTED, and the following parties are dismissed as party plaintiffs from this action without prejudice:

El Chisme, S.A. (Almacen Los Preferidos)
Alyejo, S.A. (Textimoda)
Amele, S.A.
La Futurista, S.A.
Cafeteria La Florida Business, S.A.

2) Plaintiff's motion for a stay is DENIED.

3) Defendant's motion to dismiss is GRANTED, the court concluding that the claims asserted by the plaintiffs are barred because of the discretionary function exception to the Federal Torts Claim Acts [sic], which is not overcome by the alleged violation of Article 43 of the Hague Convention. *See Goldstar (Panama), S.A. et. al. v. United States*, No. 91-725-A (E.D. Va.); *Industria Panifi-*

cadora, S.A. v. United States, 763 F. Supp. 1154 (D.D.C. 1991). Because the court lacks subject matter jurisdiction, it need not reach the question of whether this action involves a nonjusticiable political question.

/s/ Albert V. Bryan, Jr.
United States District Judge

Alexandria, Virginia
December 13, 1991

Hague Convention IV, 1907, 36 Stat. 2277, 2290

Article 3. A belligerent party which violates the provisions of the said Regulations shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces.

Hague Convention IV, 1907, Annexed Regulations, 36 Stat. 2277, 2306

Article 42. Territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised.

Article 43. The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.

28 U.S.C. § 1346(b) (1976) United States as defendant

Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. § 1350 (1976) Alien's action for tort

The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.

28 U.S.C. § 2674 (1991) Liability of the United States

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof.

* * *

28 U.S.C. § 2680 (1991) Exceptions [to United States liability]

The provisions of this chapter and section 1346(b) of this title shall not apply to—

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

* * *

(j) Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.

(k) Any claim arising in a foreign country.

* * *

República de Panamá

Panamá, R. de P.

Ministerio de Rolaviones Esleriores
Despacho de Ministro
D. M. No. 678

19 de agosto de 1991

Señor Embajador:

Tengo el honor de dirigirme a Vuestra Excelencia para hacer de su conocimiento los hechos y circunstancias que más adelante se mencionan, con la esperanza de que los problemas planteados como consecuencia de ellos, puedan encontrar una pronta y amistosa solución entre los dos Gobiernos.

Como es del conocimiento de Vuestra Excelencia, el 20 de diciembre de 1989 las Fuerzas de Defensa de Panamá fueron desarticuladas y dispersas rápida y efectivamente por tropas de los Estados Unidos de América, quedando el país sin una fuerza policial apta para mantener la ley y el orden público, ya que las tropas estadunidenses no intentaron en ningún momento asumir estas responsabilidades. Como consecuencia de lo anterior, individuos no identificados realizaron extensos y sustantiales saqueos, pillajes y otras conductas delictivas contra establecimientos comerciales, depositos y de diversa naturaleza, de propiedad de inocentes civiles, dando asi lugar a que los dueños de dichos establecimientos sufrieran pérdidas por millones de dolares, las cuales compañías de seguros por las péridida por algunos comerciantes asegurados han sido rechazados por las aseguradoras por provenir de actos de guerra. Ante esta realidad, a las victimas de las pérdidas a las que he hecho referencia no ha quedado otra alternativa que la de acudir a los tribunales de los Estados Unidos de América, a fin de obtener una compensación justa y equitativa. Entiendo, asimismo, que las acciones judiciales emprendidas se fundamentan en claras disposiciones del Derecho Internacional Público, entre las que se pueden citar la Convención

A Bu Excelencia
Deane R. Hinton
Embajador de los Estados Unidos de American
Panamá.-

de la Haya de 1907 relativa a las Leyes y Costumbres de la Guerra Terrestre.

Sin ánimo de prejuzgar los resultados de tales acciones, a petición de las victimas, solicito muy respetuosamente que el Gobierno de los Estados Unidos de América considere cuidadosamente las razores que motivaron las acciones judiciales que han sido interpuestas, con objeto de que las personas cuyas propiedades fueron destruidas y saqueadas puedan obtener una justa y equitativa compensación.

Confio en poder seguir conversando sobre este asunto con los funcionarios competentes del Gobierno de los Estados Unidos de América y en poder brindar cualquier asistencia, si fuere necesario, que facilite el pago de estas compensaciones.

Aprovecho la oportunidad para reiterar a Vuestra Excelecia las seguridades de mi alta y distinguida consideración.

Julio E. Linares
Ministro

cc.: Excelentísimo Señor Presidente de la República
Sr. Manuel Berrocal
Sr. Nathanial Méndez Goytía
Presidente del Conep

[Translation]

REPUBLIC OF PANAMA

Panama, R of P

The Ministry of Foreign Relations
Note of the Ministry
Ministry Note No. 678 August 19, 1991

Mr. Ambassador:

I have the honor to bring to your Excellency's attention the following issues and circumstances in the hope that the issues raised as a consequence of those circumstances can be brought to a prompt and amiable resolution between our two Governments.

As your Excellency is aware, on December 20, 1989, the defense forces of Panama were quickly and effectively defeated and disbursed by the troops of the United States of America, thereby leaving the country without a police force able to maintain public law and order especially as troops of the United States at no time evidenced any intention of assuming those responsibilities. As a result of the foregoing, unidentified individuals committed extensive and substantial looting, pilferage and other illegal acts against commercial establishments, warehouses, and other privately owned property of innocent civilians thus inflicting upon the owners of these establishments losses in the millions of dollars, which losses in many cases represented the entire life savings of these individuals.

It is my understanding that the claims presented to the insurance companies for the losses suffered by insured businessmen have been declined by the companies based on the act of war ex-

To your Excellency
Deane R. Hinton
Ambassador of the United States of America
Panama

ception. In view of this situation, the victims who suffered the above described losses determined that they had no alternative but to institute actions in the courts of the United States of America in order to try to obtain just and equitable compensation. I also understand that the pending actions are based on clear provisions of public international law, including the 1907 Hague Convention Respecting the Laws and Customs of War on Land.

Without wishing to prejudge the outcome of these actions, I respectfully request, on behalf of the victims, that the United States Government carefully consider the reasons which motivated the filing of the lawsuits, such being to assure that those who suffered the destruction of their property may obtain just and equitable compensation.

I count on being able to communicate with appropriate officials of the United States Government concerning this matter and to provide whatever assistance may be necessary to facilitate the payment of such compensation.

I take this opportunity to reiterate to your Excellency the assurances of my high and distinguished consideration.

/s/ Julio E. Linares
Julio E. Linares
Minister

cc: His Excellency the President of the Republic
Sr. Manual Berrocal
Sr. Nathaniel Mendez Goytia
President of Conep

República de Panamá

Panamá, R. de P.

Ministerio de Relaciones Exteriores
Despacho del Ministro
D.M. No. 050

21 de enero de 1992

Señor Embajador:

Nuevamente tengo el honor de dirigirme a Vuestra Excelencia para referirme a la situación de las personas, nacionales o extranjeras residentes en Panamá, cuyos establecimientos comerciales y propiedades fueron saqueadas, dañadas o destruidas durante los sucesos de finales del mes de diciembre de 1989.

En mi nota D.M. No. 678, tuve el honor de relatar a Vuestra Excelencia algunos hechos concernientes a estas desafortunadas personas: Que el 20 de diciembre de 1989, tropas de los Estados Unidos de América destruyeron y dispersaron a las antiguas Fuerzas de Defensa de Panamá; que, como resultado de lo anterior. Panamá estuvo, durante un lapso o periodo de tiempo, sin una fuerza de policía local que le permitiera mantener la ley y el orden; y que, debido a la ausencia de tal fuerza de policía, en los días que siguieron a la invasión hubo un resquebrajamiento total del orden público, que condujo a circunstancias en que vándalos no identificados saquearon y robaron, y en alguna otra forma dañaron o destruyeron los establecimientos comerciales, depósitos o bodegas y otras propiedades pertenecientes a inocentes civiles de mi país.

En mi nota antes aludida, también describí a Vuestra Excelencia los esfuerzos que realizan algunas de estas victimas inocentes, ante los Tribunales de los Estados Unidos de América, para obtener una justa y equitativa compensación por los daños y perjuicios sufridos, conforme a las normas y principios del Derecho Internacional Público, incluyendo las disposiciones contenidas en la Convención de La Haya de 1907 relativa a las Leyes y

Se Excelencia
Deane R. Hinton
Embajador de los Estados Unidos de América

Costumbres de la Guerra Terrestre. Sin deseos de prejuzgar los resultados de estas acciones legales, respetuosamente solicito por Vuestra digno conducto que el Ilustrado Gobierno de los Estados Unidos de América considere cuidadosamente las razones que motivaron la presentación de tales acciones, a fin de asegurar que una compensación justa y equitativa pueda obtenerse para aquéllos que sufrieron daños o destrucción a sus propiedades.

Mi Gobierno ha sabido que recientemente en los juicios que se tramitan ante los Tribunales estadounidenses, el Gobierno de los Estados Unidos de América ha expresado la opinion que es necesario que el Gobierno de Panama solicite que sean aplicadas las disposiciones contenidas en la Convención de La Haya de 1907, a fin de que los reclamos de estos cuidadanos sean considerados. En vista de lo anterior, tengo el honor de notificar a Vuestra Excelencia, en nombre de las personas y de los ciudadanos de mi País, cuyas propiedades fueron dañadas o destruidas, que es el deseo del Gobierno de Panama que la Convención de La Haya de 1907 sea aplicada en y por los tribunales de los Estados Unidos de América. de la misma manera como se aplican localmente todas las normas del Derecho Internacional Público por los Estados que han contribuido a su formación o se han adherido a él.

Mi Gobierno reitera que no desea prejuzgar los resultados de ningún juicio en particular. Sin embargo, en la medida en que los reclamantes puedan individualmente demostrar que sufrieron daños o perjuicios que la Convención de la Haya de 1907 intentó impedir, nuevamente, con todo respeto, solicito que esos reclamos reciban una consideracion justa e imparcial en y por los Tribunales de los Estados Unidos de América.

Debido al gran número de tales reclamos y a la multiplicidad de los diferentes daños y perjuicios sufridos, mi Gobierno no tiene objección a que los individuos perjudicados procedan por su propia cuenta, como ocurre, por ejemplo, con respecto a los reclamos de que trata la Convención de Varsovia de 1929 relacionada al Transporte Aéreo Internacional. Mi Gobierno también cree que bajo estas circunstancias únicas, los tribunales civiles están calificados para evaluar las pruebas concernientes a las perdidas, daños y perjuicios ocasionados a las propiedades que los reclamantes presentarán.

Mi Gobierno agradecerá que Vuestra Excelencia presente estos puntos de vista a la atención de los Tribunales y/u otros organis-

mos judiciales o administrativos de los Estados Unidos de América, ante los cuales acciones o demandas han sido presentadas y se tramitan en la actualidad.

Aprovecho la opportunidad para renovar a Vuestra Excelencia las seguridades de mi alta consideración.

/s/ Julio E. Linares
Julio E. Linares
Ministro

REPUBLIC OF PANAMA

Ministry of Foreign Affairs
Office of the Minister
D.M. No. 050

Panama, R. of P.

January 21, 1992

Mr. Ambassador:

I again have the honor to address myself to your Excellency concerning the circumstances of citizens of my country or foreigners residing in Panama whose commercial establishments and property were looted, damaged, or destroyed during the events of late December 1989.

In my Note No. 678, I had the honor of relating to Your Excellency some of the facts concerning these unfortunate individuals: that on December 20, 1989, troops of the United States of America defeated and dispersed the former defense forces of Panama; that, as a result of the foregoing, Panama was, for a considerable period, without any indigenous police force able to maintain public law and order; and that, because of the absence of such a police force, in the days following the invasion, there was a total breakdown of public order, leading to circumstances where unidentified vandals looted and pilfered property from, and otherwise damaged or destroyed, the commercial establishments, warehouses and other property owned by these innocent civilians of my country.

In my aforementioned note, I also described for your Excellency the efforts of certain of these innocent victims before the Courts of the United States of America, to obtain just and equitable compensation for their injuries in accordance with and pursuant to prevailing principles of public international law, including the 1907 Hague Convention Respecting the Law and Customs of War. Without wishing to prejudge the outcome of these legal actions, I

Your Excellency
Dean R. Hinton
Ambassador to the United States of America

respectfully request that the Government of the United States of America carefully consider the reasons which motivated the filing of those actions in order to assure that some just and equitable compensation might be obtained by those who suffered damage to or destruction of their property.

My Government has learned that recently in the Court proceedings pending before the Courts of the United States, the Government of the United States of America has expressed the view that it is necessary for the Government of Panama to request enforcement of the provisions of the 1907 Hague Convention in order for these citizens' claims to be considered. In view thereof, I have the honor to advise your Excellency that, on behalf of the persons and citizens of my country whose property was so damaged or destroyed, it is the desire of the Government of Panama that the 1907 Hague Convention be applied in and by the courts of the United States in the same manner as all public international laws are adhered to and enforced by their signatory nations.

My Government emphasizes that it does not wish to prejudge the outcome of any particular proceeding. However, insofar as individual claimants are able to establish that they suffered damage or injury which the 1907 Hague Convention was intended to prevent, we again respectfully request that those claims be given fair and impartial consideration in and by the Courts of the United States of America.

Because of the large number of these claims, and the multiplicity of different injuries, my government does not object to the injured individuals proceeding on their own behalves, as is the case, for example, with respect to claims under the Warsaw Convention of 1929 Relating to International Transportation by Air. My Government also believes that in these unique circumstances civil courts are best equipped to evaluate the proofs of loss, damage and injury to property that claimants such as these will present.

My Government would appreciate if Your Excellency would bring these views to the attention of the courts and/or other judicial or administrative bodies of the United States of America where these law actions have been filed and are now pending.

I take this opportunity to reiterate to your Excellency the assurances of my high and distinguished consideration.

Julio E. Linares
Minister